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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

B233864

Plaintiff and Respondent,

(Los Angeles County Super. Ct. No. LA062282)

v.

JUAN CARLOS HUEZO,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. Lippitt, Judge. Affirmed in part, modified in part and remanded.

Richard C. Neuhoff, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Juan Carlos Huezo (defendant) was convicted of murder (Pen. Code, § 187, subd. (a)¹). On appeal, defendant contends that the trial court committed prejudicial error by instructing the jury that it could only consider defendant's voluntary intoxication to determine whether defendant acted with the intent necessary for first-degree deliberate and premeditated murder and not in connection with the felonymurder charge; allowing the jury to be informed that a witness had not been given immunity; admitting evidence that defendant's cousin told a witness to "stick to the story;" and to the extent there were any forfeitures, there was ineffective assistance of counsel. Defendant also contends that the cumulative effect of the errors requires reversal. The Attorney General requests that we strike the parole revocation fine that was imposed and suspended against defendant. We affirm the judgment as to defendant's contentions, modify defendant's sentence to eliminate the imposition of a parole revocation fine, and remand the matter to the trial court to amend the abstract of judgment accordingly.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

Marissa Hernandez² testified that six years ago she and defendant had dated "on and off" for about a year and thereafter they were intermittent friends. On the night of June 7, 2009, after not speaking to defendant for several months, Marissa called defendant to determine if he wanted to get together. Defendant agreed, and they went to

All statutory citations are to the Penal Code unless otherwise noted.

Marissa Hernandez shares the same surname as her sister, Priscilla Hernandez. For clarity, further references to these individuals are by their first name only.

a bar in Glendale and consumed seven "tasters" of medium sized beers for about one hour.

Marissa testified that she and defendant decided to rent a room at a motel in North Hollywood. When they arrived at the motel, defendant went inside to see how much a room would cost. When defendant returned to the car, he told Marissa there was a man in the office, later identified as Filemon Cortez, who had a lot of cash on him.

Marissa testified that defendant and Marissa then drove to a convenience store across the street from the motel, and Cortez had exited the motel and was crossing the street. Defendant referenced Cortez and told Marissa that Cortez was going to the convenience store to get change. Defendant told Marissa that he wanted to "get off and jack him for his money," which Marissa understood to mean to steal Cortez's money. Marissa did not think defendant was serious.

Marissa testified that when she and defendant arrived at the convenience store, defendant went in to purchase cranberry juice. When defendant exited the convenience store, he and Cortez spoke. At some point, defendant and Cortez exchanged telephone numbers.

Marissa testified that defendant and Marissa returned to the motel and rented a room. Defendant called Cortez and invited him to drink with them. Marissa drove defendant and Cortez to two convenience stores where they bought a bottle of vodka and more cranberry juice.

Marissa testified that the three of them returned to the hotel and drank about half a bottle of vodka in Cortez's room. At some point defendant went into the bathroom, and when he exited the bathroom he was carrying a bottle of vodka. Defendant then stood behind Cortez, gestured to Marissa to be quiet by placing his finger against his lips, and struck Cortez on the back of the head with the bottle. Marissa told defendant, "You killed him," and "What did you do?" Defendant told Marissa to shut up and get the car.

Marissa testified that she does not recall dancing by herself in Cortez's room that night. Cortez had not been flirting with her or acting inappropriately toward her before defendant struck him with the bottle. Cortez had not hit or threatened defendant, and

defendant and Cortez did not have an altercation before defendant struck Cortez with the bottle. Defendant may have patted down Cortez pant pockets.

Marissa testified that she retrieved her vehicle and pulled it up to the motel room. She did not drive away alone because she was scared and did not know what to do. Defendant got into the vehicle carrying the vodka bottle. Marissa testified that her memory was blurry and she did not remember whether she or defendant drove away.

Dahyabhai Patel³ testified that he was the manger of the motel and was working at the time of the incident. Earlier that day, Dahyabhai had rented a room to Cortez. Cortez had placed his wallet on the counter while checking in, and defendant was near him. That night, Dahyabhai heard a man screaming from Cortez's room. Dahyabhai and the motel owner's son, Ashish, knocked on the door to Cortez's room, and Marissa and defendant exited the room. Ashish testified that defendant told him, "Don't open the door. Everything is fine." Dahyabhai and Ashish testified that Marissa and defendant drove off, and Cortez was lying on the floor with blood coming from his head. Dahyabhai testified that Ashish noted the license plate number of the car, and they called 911.

Aaron Halverson, a paramedic with the City of Los Angeles Fire Department, testified that he arrived at the scene and found Cortez unconscious and unresponsive. Cortez had a four-inch laceration on the back of his head and was surrounded by broken glass. Los Angeles Police Department Detective Charles Lenane testified that he responded to the scene and there were blood stains and splatters of blood in the room. Halverson testified that Cortez was in critical condition and transported to the hospital. Cortez subsequently died. Detective Lenane testified that no wallet or money was found in the room.

Because Dahyabhai Patel and Ashish Patel share the same surname, we refer to them by their first names.

Marissa testified that she went home and told Priscilla that she had just seen defendant kill somebody, and Priscilla called the police. When the police arrived they handcuffed Marissa and took her to the police station.

Priscilla testified that Marissa came home between 2:30 and 3:00 a.m. on June 8, 2009, traumatized, saying defendant "rob[bed] a guy and hit him over the head over and over with [a] bottle." Marissa told Priscilla that before defendant struck Cortez with the bottle, he "kept telling her, 'I'm going to rob him. I'm going to rob him. He has a lot of money." Priscilla does not recall Marissa telling her that Cortez "tried to hit on her." When Marissa told Priscilla that Cortez was dead, Priscilla called the police. Priscilla told the police that Marissa said Cortez had tried to "hit on" Marissa, and defendant and Cortez started to argue prior to defendant repeatedly hitting Cortez on the head with the bottle. The day after the incident Marissa told Priscilla that Cortez did not "hit on" her.

At about 4:30 a.m. on June 8, 2009, the morning after the incident, Marissa was interviewed by Detective Edwards of the Los Angeles Police Department, an audio recording of which was played for the jury. Marissa was scared and still intoxicated during the interview. Marissa told Detective Edwards that after defendant paid for the room defendant told Marissa that Cortez had a lot of money and defendant wanted to steal it. Marissa said she told defendant that they were not going to do that, and defendant responded to Marissa, "Oh, okay. Okay. Hey, now I know."

Marissa told Detective Edwards that Cortez "had stared at her "like I was a piece of meat or something." She asked defendant "what the hell is [Cortez] looking at," and defendant responded, "Nothing. He just wants to hang out with us." Marissa told Detective Edwards that when they were in Cortez's motel room, Cortez had "kind of hit on me." Marissa said defendant and Cortez "[got] into it. And [defendant] just like knocked him with the bottle of [vodka] and killed him." Marissa "completely freaked out," ran out of the room, retrieved her car, and picked up defendant. Marissa told defendant she was "going to call the cops on you," and defendant replied that if she did

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Marissa testified at trial that she did not recall talking to Detective Edwards because was feeling the effects of the alcohol and fatigue.

he was going to kill her. Marissa testified that at some point defendant drove, she was in the passenger seat, and they picked up defendant's "really big" friend. Defendant's friend drove the vehicle, dropped off defendant, took Marissa back to her house, and told Marissa, "[I]f you say anything, a lot is going to happen to you." Marissa ran up to her house, told her sister what happened, and her sister called the police.

Marissa told Detective Edwards that she has no idea why defendant hit Cortez—defendant and Cortez were not arguing about anything, and she never saw defendant take Cortez's money. Marissa said she felt threatened that if she spoke up, defendant would hurt her. Marissa asked Detective Edwards, "If I tell you exactly what happened, will you let me go home? Honestly? I'll probably tell you what happened." Detective Edwards responded, "[At this moment] I have no intention of holding you. . . . I'd like you to feel comfortable to speak freely. . . . [¶] It's just when you say, 'Well, if I tell you the truth, you going to let me go?" [¶] [I]f you tell me right after that . . . you robbed five banks, well then I would have [lied]. . . . [¶] My only question to you now is, can we continue talking or—or do we have to stop? [¶] [C]an we continue talking . . . what are willing to do—because I do have one or two more questions for you." Marissa said, "Continue with your questions." When Detective Edwards then asked Marissa why she thinks defendant hit Cortez, she said, "Honestly—hit him to jack him—. . . . [¶] —for his money that he had." She then said that defendant "most likely" took Cortez's money, but she did not see him do it.

At about 4:00 p.m. on June 8, 2009, Marissa was interviewed by Detective Mario Santana of the Los Angeles Police Department, and all but a small portion of an audio recording of the interview was played for the jury. Marissa told Detective Santana, inter alia, that when defendant returned from the motel to the vehicle after determining how much a room would cost, he told Marissa that Cortez had "so much money" and "[1]et me jack him. Let me beat him up." Marissa responded no, "I'm not going to get in trouble for you." At one point after consuming shots of vodka in defendant's room, Cortez was

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Marissa testified that she remembered most of this interview.

sitting on the bed, and defendant went to the bathroom carrying the bottle of vodka. Marissa said that she became "tipsy," danced by herself next to Cortez, and then sat next to Cortez talking to him. Marissa then sat in a chair and continued to drink. Defendant returned from the bathroom, carrying the bottle of vodka, approached Cortez from behind, gestured to Marissa to be quiet, and struck Cortez in the back of the head with the vodka bottle.

Paul Gliniecki, a Deputy Medical Examiner for the Los Angeles Department of Coroner, testified that he performed an autopsy on Cortez and determined that the Cortez died from a blunt force trauma to the head, which was the result of a powerful blow that fractured his skull. The skull fractures could have been caused by a bottle striking Cortez's skull.

Cortez had a small abrasion to his right eyebrow and next to his left eye, a small laceration next to his left ear, and bruises on the back and front of his right hand, left wrist, and right bicep. Gliniecki did not know with what the laceration to Cortez's left ear was consistent, but it was possible that it was consistent with a blow from a fist fight, as was the abrasion to this right eyebrow. Gliniecki did not know what caused the bruising on Cortez's hand and wrist. The bruises to the right hand were consistent with a blow to someone's head or face, or someone who works with their hands, but those injuries, as well as the injuries to Cortez's left wrist, were not typical fist fight injuries.

Gliniecki testified that Cortez also sustained five fractured ribs, and he had bruises on his lungs and surrounding muscles. Those injuries were caused by application of a significant amount of force, and were consistent with someone stomping the ribs with a foot. Gliniecki testified that all of Cortez's injuries appeared to have occurred at around the same time, while Cortez was alive, but he could not determine the order in which he sustained them.

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Marissa testified that she did not remember telling this to Detective Santana.

2. Defense Evidence

An audio recording of defendant's interview with Detectives Santana and Joshua Byers on June 9, 2009, was played for the jury. Defendant told the detectives that, "I don't know what happened that night [of the incident]. When I, when I woke up the next morning, it was just with the biggest hangover." According to defendant, he and Marissa were drinking shots and beer. When they left to go to the motel they were "pretty messed" up." After getting a room at the motel, they meet Cortez who invited them to drink with him. Cortez bought a bottle of alcohol, and they consumed it. Defendant went to the restroom, and when he came out Marissa told him that Cortez was "trying to do it, he's trying to do it or something." Cortez, who was not wearing pants, "rushed towards" defendant with a bottle and they "[s]omehow . . . got into an argument." They "were all wasted." Defendant and Cortez fought, but defendant "didn't know how it started or . . . finished." Defendant did not know who did what to whom, but defendant believes that when he walked out of the room he had a bottle in his hand and it fell at the door. Defendant said he "didn't hit no one with a bottle." Defendant said he injured his right hand during the fight, and Detective Santana agreed that it was a little swollen. Defendant denied taking Cortez's wallet or money, other than the money Cortez gave defendant to purchase the bottle of alcohol. Defendant did not intend to take Cortez's wallet.

Detective Santana testified that he interviewed defendant at about 10:30 p.m. on June 9, 2009. During the interview, defendant said he injured his hand during the fight with Cortez, but there was no visible injury or swelling. As a ruse to keep the interview going, Detective Santana agreed with defendant that his hand appeared to be injured.

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with one count of the murder of Cortez in violation of section 187, subdivision (a). The District Attorney alleged that defendant personally used a deadly weapon in violation of section 12022, subdivision (b)(1), and killed Cortez during the commission

of a robbery in violation of section 190.2, subdivision (a)(17). The District Attorney further alleged that defendant had served one prior prison term within the meaning of section 667.5, subdivision (b), and had four prior felony convictions with the meaning of section 1203, subdivision (e)(4).

Following a trial, the jury found defendant guilty of murder, found the murder to be in the first degree, and found that the special circumstances and deadly weapons allegations were true. The trial court sentenced defendant to state prison for a term of life without the possibility of parole. The trial court ordered defendant to pay a \$10,000 restitution fine pursuant to subdivision (b) of section 1202.4, a \$30 criminal conviction assessment, and a \$40 court security assessment. The trial court imposed and suspended a \$10,000 parole revocation fine pursuant to section 1202.45.⁷

DISCUSSION

A. Voluntary Intoxication Instruction

The jury was instructed that defendant could be found guilty of first degree murder if the murder was willful and premeditated, or during the commission of a robbery. Defendant contends that the trial court committed prejudicial error when it instructed the jury that it may consider evidence of defendant's intoxication only in deciding whether he acted with an intent to kill or if defendant acted with deliberation and premeditation, thereby precluding the jury from considering such evidence in determining whether defendant acted with the specific intent to commit battery. Although the trial court erred, the error was harmless.

1. Background Facts

The following exchange occurred during a discussion about proposed jury instructions: "[Trial court:] Voluntary intoxication. There seems to be evidence of

As discussed below, we strike the \$10,000 parole revocation fine because defendant was not eligible for parole.

alcohol in this case. [Prosecutor:] Your Honor, the voluntary intoxication goes to the malice element, the intent to kill, with respect to murder. It doesn't apply in a felony murder context. [Defendant's counsel:] Well, it would—I mean obviously under their theory they have to prove robbery, which is a specific intent crime. So certainly it would go to whether or not [defendant] had the intent to permanently deprive, which robbery would ask for. And I'm not sure that the People are simply asking for the 187 based on a felony murder theory. It could be under a malice theory too that the jury could find based on the evidence. [¶] I mean if the jury were to accept [defendant] hit [Cortez] in the head with the bottle, but it wasn't in the course of robbery, it could still be a 187." The matter was submitted and the trial court moved on without comment. Later, during a discussion about the proposed jury instruction for voluntary intoxication, the trial court inquired whether either counsel wanted to be heard regarding it, and both the prosecutor and defendant's counsel said they did not. The only theory of first-degree murder argued by the prosecutor was the felony-murder based on robbery.

The trial court instructed the jury pursuant to CALCRIM No. 625,⁸ stating, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or if the defendant acted with deliberation and premeditation. [¶] A person is voluntarily intoxicated if she or he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating

CALCRIM No. 625 provides, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant ________ <insert other specific intent required in a homicide charge or other charged offense>.] [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

effect or willingly assume the risk of that effect. You may not consider evidence of involuntary [sic] intoxication for any other purpose."

2. Analysis

Although the jury was instructed that defendant could be found guilty of first degree murder if the murder was willful and premeditated, or during the commission of a robbery, it is undisputed that the prosecutor's only theory was that defendant killed Cortez during the commission of a robbery. Robbery, as the jury was instructed, requires a showing that there was a specific intent to steal. (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007). There was substantial evidence that defendant was intoxicated at the time he killed Cortez.

The parties agree that the trial court's instruction to the jury under CALCRIM No. 625 was erroneous because it prohibited the jury from considering the evidence of defendant's voluntary intoxication in determining whether defendant acted with the specific intent to commit battery. (See *People v. Mickey* (1991) 54 Cal.3d 612, 675.) The Attorney General contends, however, that the error was harmless pursuant to *People v. Watson* (1956) 46 Cal.2d 818 [more favorable outcome for defendant reasonably probable absent error]. Defendant contends that he was deprived of a potentially meritorious challenge to the prosecution's case and, therefore, the harmless error standard under *Chapman v. California* (1967) 386 U.S. 18 [harmless beyond a reasonable doubt] applies. We conclude that the error was harmless under either standard.

Prior to going to defendant's room, defendant announced that he intended to steal from Cortez, and then he followed through with his announced intention. Evidence was introduced that when Cortez rented the motel room from the manger of the motel, he had placed his wallet on the counter, and defendant was near him. Marissa testified, and told Detectives Edwards and Santana, that when defendant returned to the car from the motel office, he told Marissa that Cortez had a lot of cash on him and defendant wanted to steal it. Priscilla testified that when Marissa arrived home shortly after the incident, Marissa told her that defendant "rob[bed] a guy and hit him over the head over and over with [a]

bottle" and that before defendant struck Cortez with the bottle, defendant "kept telling [Marissa], 'I'm going to rob him. I'm going to rob him. He has a lot of money."

The evidence establishes that when defendant was in Cortez's room, defendant approached Cortez from behind carrying a bottle of vodka, gestured to Marissa to be quiet by placing his finger against his lips, and struck Cortez in the back of the head with the bottle. It is reasonable to infer that by defendant gesturing to Marissa to be quiet, he knew what he was doing, that he harbored the intent to steal from Cortez without being detected, and that he was consciously and deliberately signaling his intent to Marissa. Marissa testified that defendant may have patted down Cortez's pants pockets, and Ashish testified that when he knocked on the door of the motel room, defendant told him, "Don't open the door. Everything is fine." Defendant immediately fled the scene. No wallet or cash was found in the room.

Defendant contends that the trial court's erroneous instruction was not harmless error because it precluded the jury from considering the evidence of defendant's intoxication in determining whether defendant engaged in a "drunken pay-back [fight with Cortez] for flirting with or disrespecting Marissa" as opposed to whether defendant intended to steal. At trial, defendant's counsel argued to the jury that defendant did not intend to steal from Cortez, but instead that defendant and Cortez were engaged in a fight over Marissa. The jury rejected this argument, finding that defendant intended to commit a robbery. That defendant may have been intoxicated at the time of the incident is of no significance to the jury's determination.

The judgment against defendant was not sufficiently affected by the trial court's failure to instruct the jury that voluntary intoxication could negate the specific intent required to commit the crime of robbery. The failure was harmless error.

B. Immunity

Defendant contends that the trial court erred by striking the language from CALCRIM No. 226, that in determining the credibility or believability of a witness the jury may consider whether "the witness [was] promised immunity or leniency in

exchange for his or her testimony," and allowing the prosecutor to argue before the jury that Marissa did not have immunity. Defendant contends that this violated his right to due process under the Fifth and Fourteenth Amendments, and his rights to compulsory process and confrontation under the Sixth Amendment to the United States Constitution. We disagree.

1. Background Facts

During Marissa's testimony at the preliminary hearing, before the Honorable Jessica P. Silvers, at which the prosecutor was Edward Nison, Marissa asked to take a break. On cross-examination, she stated that at the break she spoke with the prosecutor and a detective and told them that she was scared to be there. When asked if they discussed anything else, Marissa answered, "Yes. [¶] . . . About that they haven't given me immunity." Marissa testified that the day before, "They had told me they were going to give me one before I asked for one."

The following exchange occurred during the preliminary hearing: "[Prosecutor:] Your Honor, [for] the record, [Marissa] had an attorney who advised her. So clearly, there was some discussions regarding [immunity]. [¶] ... And he made the determination that it was not necessary. [Trial court:] Because the People had agreed there would be absolutely no filing of any charges relating to this incident against this witness. [Prosecutor:] Correct, Your Honor. That none of her testimony would give rise to any such charge. [Trial court:] That's correct. That was said here. [Defendant's counsel:] Right." Marissa resumed her testimony, and the following exchange occurred: "[Defendant's counsel:] So when you started the actual testimony [today], talking about what actually happened, you felt assured you would not be prosecuted for anything; is that correct? [Marissa:] For the most part, yes. [Defendant's counsel:] You felt you had immunity then; is that correct? [Marissa:] Yes. I know I didn't do anything either, so—[Defendant's counsel:] Thank you. Nothing additional."

The Honorable Elizabeth A. Lippitt presided over the trial, and Scott Marcus was the prosecutor. The following exchange occurred at a pre-trial conference: "[Trial

court:] Is there any issue that [Marissa] is arguably involved under an aider and abettor theory? [Prosecutor:] Not from the People's perspective. [Trial court:] Okay. [Defendant's counsel:] I think the immunity came up at prelim. [Marissa] was appointed counsel, and she testified she felt she had immunity. I'm not sure if it was ever formally offered to her. I don't believe so. She did have the advisement of counsel, and I think that issue has been gone over. [Prosecutor:] I didn't do the prelim. But my understanding from reviewing the prelim transcript she was appointed counsel. The deputy district attorney handling the preliminary hearing stated on the record that he did not envision any charges that could be filed against her based on what we anticipated her testimony to be. Her appointed lawyer agreed with that statement, and she proceeded to testify. I don't believe immunity was officially offered, and I don't believe she ever took the Fifth. [Trial court:] Immunity and leniency at this point doesn't seem to be an issue."

Defendant's counsel argued that whether Marissa thought she had immunity was relevant to her state of mind. The prosecutor stated that he had no objection if defendant's counsel wanted to ask Marissa questions going to her bias or creditability.

Marissa testified at trial that she "thinks" the term immunity, in the context of a criminal case, "means anything you say can't be held against you later on," but she said she did not know if it also means that "you can't be charged for anything you say." The following exchange then occurred: "[Defendant's counsel:] The day before [the preliminary hearing], did you talk to either of the detectives on that day; of immunity for yourself? [Marissa:] Yes. [¶] ... [Defendant's counsel:] Do you recall what you said regarding immunity? [Marissa:] No. I don't remember exactly, exactly what I said. [Defendant's counsel:] Do you recall what they said regarding immunity? [Marissa:] No." Marissa testified that she asked for immunity. Defendant's counsel asked Marissa "[d]id you feel you got it when you asked for it?" Marissa responded, "I don't know. I don't know—we talked about it and—it doesn't really matter. I'm still going to testify. I have to do what I have to do, do the right thing."

Marissa testified that she had an attorney at the preliminary hearing, and she had spoken to the prosecutor and a detective during a break in her testimony at the hearing

about immunity. Defendant's counsel asked Marissa, "At [the] point [she spoke to her attorney] did you feel assured you had immunity?" Marissa responded, "I guess. I don't know." Defendant's counsel asked Marissa "after you talk[ed] to . . . [the] detectives [during a break in her preliminary hearing testimony], did you feel you had immunity?" Marissa responded, "Well, they announced it in court that I did really quickly." On redirect examination, Marissa testified that there was a statement made on the record during the preliminary hearing that "there wasn't anything to charge [her] with," and she testified at the hearing as "honestly and completely" as she could.

During a discussion of proposed jury instructions, counsel and the trial court discussed CALCRIM No. 226, which concerns the factors a jury may consider in determining the credibility or believability of a witness, including as a possible factor dependant on the evidence, "Was the witness promised immunity or leniency in exchange for his or her testimony?" The prosecutor proposed that this possible factor not be

CALCRIM No. 226 provides, "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] • How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] • How well was the witness able to remember and describe what happened? $[\P]$ • What was the witness's behavior while testifying? $[\P]$ • Did the witness understand the questions and answer them directly? $[\P]$ • Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] • What was the witness's attitude about the case or about testifying? $[\P]$ • Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] • How reasonable is the testimony when you consider all the other evidence in the case? [¶] • [Did other evidence prove or disprove any fact about which the witness testified? $[\P] \cdot [Did]$ the witness admit to being untruthful?] [¶] • [What is the witness's character for truthfulness?] $[\P]$ • [Has the witness been convicted of a felony?] $[\P]$ • [Has the witness engaged in [other] conduct that reflects on his or her believability?] [¶] • [Was the witness promised immunity or leniency in exchange for his or her testimony?] [¶] Do

included in the instruction given to the jury because "there was no immunity promised to [Marissa]." The trial court stated, "That's true. All right. We will cross out that paragraph, the immunity one." Defendant's counsel agreed with the trial court, stating, "Right. Perhaps we can have a special instruction, if the witness felt she had immunity." The trial court invited defendant's counsel to submit such a proposed special instruction, but the record does not include one. The trial court also stated that defendant's counsel could argue the matter to the jury.

During closing arguments, defendant's counsel argued concerning Marissa, "[The day of the preliminary hearing], I need a bathroom break. Sure. By all means. Oh, detective, Mr. District Attorney, let's talk about immunity for myself. Did she get it? I don't think we actually heard she ever got it. Perhaps another factor to greatly influence her, her testimony. She certainly took that break to ask for it." In rebuttal, without an objection by defendant's counsel, the prosecutor argued before the jury, "The defense wants you to think that Marissa... upon taking this break at the preliminary hearing—and again, I wasn't there. I don't know—to arrange for her immunity. [According to defendant's counsel,] [t]hat's when, you know, all these things started changing. That's when she decided to start telling a different story.... [¶] ... Marissa... doesn't have immunity. You didn't see any paperwork. You didn't hear any testimony of it. You heard her say she thought she was taken care of, but you didn't see any proof of any actual immunity because there wasn't any immunity."

not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] [If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.] [¶] [If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.] [¶] [If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.]"

2. Analysis

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) But "where a witness receives immunity, that witness's testimony is compelled and the witness no longer has a privilege against self-incrimination. [Citations.]" (*People v. Morgain* (2009) 177 Cal.App.4th 454, 466-467.) CALCRIM No. 226 provides that in order for the jury to consider it in determining a witness's credibility the witness must be "promised immunity or leniency in exchange for his or her testimony."

Marissa was not given immunity by the prosecution. She was not "promised" immunity or leniency, nor was one made "in exchange for his or her testimony[.]" The prosecutor at the preliminary hearing stated that Marissa's counsel determined that immunity for Marissa was not necessary because the prosecution said that Marissa's testimony would not give rise to the filing of any charges against her relating to this incident. Defendant's counsel conceded, "I'm not sure if [immunity] was ever formally offered to [Marissa]. I don't believe so." Even Marissa was vague as to her recollection what was said about the issue of immunity and her understanding of whether she "felt" she was given immunity, but at one point when was asked at trial whether she felt she got immunity, she responded, "I don't know. I don't know—we talked about it and—it doesn't really matter. I'm still going to testify. I have to do what I have to do, do the right thing."

The trial court did not err by striking the language from the jury instruction that in determining the credibility or believability of a witness the jury may consider whether the witness was given immunity, or by allowing the prosecutor to argue before the jury that Marissa did not have immunity.

C. Testimony That Andy Huezo Told Marissa to "Stick to the Story"

Defendant contends that the trial court erred in admitting evidence that Andy Huezo told Marissa to "stick to the story." We disagree.

1. Standard of Review

The trial court's ruling to admit evidence over defendant's objection based on Evidence Code section 352 is reviewed under an abuse of discretion standard of review. (See *People v. Avila* (2006) 38 Cal.4th 491, 578 ["We review for abuse of discretion a trial court's rulings on relevance and the exclusion of evidence under Evidence Code section 352"].)

2. Background Facts

Marissa testified that a day or two after the incident, Andy Huezo, defendant's cousin and Marissa's boyfriend at the time, called Marissa and told her, "Just stick to the story. You know what story I'm talking about." Marissa said, "I think he said the one you and [defendant] talked about or something." Marissa did not know what "story" Andy Huezo was talking about, and she did not recall defendant telling her what story to tell the police. Marissa told the police about the telephone call.

Detective Santana testified that on June 10, 2009, Marissa told him that the day before Andy Huezo had called her and "told her to remember the story that he told, that the defendant gave her." In response to being asked whether Marissa told him what that story was, Detective Santana responded, "That the victim, . . . Cortez, tried to sexually assault her and that he was defending her." During argument to the jury, the prosecutor said, "[Defendant and Cortez] weren't fighting. That never happened. That was the lie that Marissa . . . told initially because the defendant told her to, but realized she couldn't protect him anymore and then told the truth . . ."

Defendant previously objected to such evidence under Evidence Code section 352, ¹⁰ contending that the probative value is outweighed by the prejudicial impact because "it creates a very unfair nexus to" defendant. The trial court overruled the

Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

objection stating "probative matters usually are prejudicial against the defendant." The trial court cited *People v. Olguin* (1994) 31 Cal.App.4th 1355, and stated that it "specifically addresses after a crime where witnesses are threatened or influenced that it is admissible because all—this case has everything to do with credibility [¶] . . . It clearly is probative as to credibility and the effect on the listener. We will let that in, and we can talk about a limiting instruction."

At the close of trial, the trial court gave the following limiting instruction, which defendant's counsel and the prosecutor agreed was appropriate: "During trial, certain evidence was admitted for a limited purpose. The phone conversation from [Andy Huezo] to 'stick to the story' was admitted for the credibility and the effect on the mind of witness Marissa You may consider that evidence only for that purpose and for no other.

3. *Analysis*

"[T]he court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing" (Evid. Code, § 780.) This includes, but is not limited to, "[t]he existence or nonexistence of a bias, interest, or other motive. . . . [\P] . . . testimony." (*Id.* at subds. (f), (j).) Evidence that Andy Huezo told Marissa to "stick to the story" was highly probative because it concerned the credibility of a key witness in the case.

"California law prohibits proving consciousness of guilt by establishing attempts to suppress evidence unless those attempts can be connected to a defendant. [Citations.]" (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1368.) There was evidence introduced at trial that the story Andy Huezo told Marissa to "stick to" was given to Marissa by defendant—that Cortez had "tried to sexually assault her and that he was defending her." Defendant contends that he was prejudiced by the admission of this evidence, and that prejudice substantially outweighed the probative value of the evidence, because it can be

reasonably inferred that defendant was attempting to suppress evidence, thereby showing his consciousness of guilt. Defendant similarly contends that he was prejudiced when the prosecutor purportedly attempted to prove his consciousness of guilt when he argued to the jury, "[Defendant and Cortez] weren't fighting. That never happened. That was the lie that Marissa . . . told initially because the defendant told her to, but realized she couldn't protect him anymore and then told the truth. . . ."

The prosecutor was not attempting to prove defendant's consciousness of guilt. The prosecutor was commenting on the credibility of Marissa's testimony and why she previously gave one account to police officers. In addition, the trial court gave the jury a limiting instruction that evidence of "[t]he phone conversation from [Andy Huezo] to 'stick to the story' was admitted for the credibility and the effect on the mind of witness Marissa You may consider that evidence only for that purpose and for no other. We presume the jury followed the trial court's instructions. (*People v. Avila, supra*, 46 Cal.4th at p. 719; *People v. Bennett* (2009) 45 Cal.4th 577, 596.) Whatever prejudice defendant might have experienced from the evidence was substantially diminished by the limiting instruction.

Here, as in *People v. Olguin, supra*, 31 Cal.App.4th 1355, "There was never an argument, never even a suggestion, that [the] evidence [of a third party's attempt to suppress evidence] reflected [defendant's] consciousness of guilt. It was strictly limited to establishing the witness's state of mind. For this purpose it was highly relevant." (*Id.* at p. 1368.)

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." (*People v. Yu* (1983) 143 Cal.App.3d

358, 377 [191 Cal.Rptr. 859].)" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The trial court did not err in admitting the evidence.

D. Parole Revocation Fine

Although the issue was not raised by defendant, the Attorney General observed that it was improper for the trial court to impose (and suspend) a \$10,000 parole revocation fine pursuant to section 1202.45¹¹ because defendant received a life sentence without the possibility of parole. We agree, and we strike parole revocation fine.

E. Cumulative Error

Defendant contends that the cumulative effect of errors committed by the trial court requires the reversal of his conviction. There has been no showing of cumulative prejudicial error. (*People v. Watson* (2008) 43 Cal.4th 652, 704; *People v. Boyette* (2002) 29 Cal.4th 381, 467-468; *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692 [few errors identified were minor and either individually or cumulatively would not alter the outcome of the trial]; *People v. Cudjo* (1993) 6 Cal.4th 585, 630 [no cumulative error when the few errors that occurred during the trial were inconsequential].) Whether considered individually or for their cumulative effect, any of the errors alleged did not affect the accuracy of the fact finding process or accrue to defendant's detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Cudjo*, *supra*, 6 Cal.4th at p. 637.) As the California Supreme Court has consistently held, "[A] defendant [is] entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Mincey*, *supra*, 2 Cal.4th at p. 454; *People v. Miranda* (1987) 44 Cal.3d 57, 123.)

Section 1202.45 provides in relevant part, "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4..."

Having determined that there is merit in only one of defendant's contentions, but holding that error harmless, there is no occasion to consider the cumulative impact of errors. Also, because there was no prejudicial error, we did not deal with any forfeitures of an issue or the ineffective assistance of counsel contention if there had been a forfeiture.

DISPOSITION

The judgment is modified to eliminate the imposition of a \$10,000 parole revocation fine. The matter is remanded for the trial court to amend the abstract of judgment accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

We concur:

TURNER, P. J.

ARMSTRONG, J.